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No. 04-85

In The Supreme Court of the United States

JOSEPH GROODY, ET AL.,

Petitioners,

v.

JOHN DOE, PARENT AND NATURAL GUARDIAN OF MARY DOE, A MINOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On March 6, 1998, members of the Schuylkill County Drug Task executed a search warrant at the home of John Doe in Ashland, Pennsylvania. Doe's wife, Jane Doe, and his ten year old daughter, Mary Doe, were home at the time. The search warrant specifically authorized a search of John Doe. Neither Jane nor Mary Doe were specified as "persons to be searched," yet they were subjected to highly intrusive strip searches in a futile effort to find illegal drugs.

On March 6, 1998, based upon an eight month investigation, an Affidavit of Probable Cause and Search Warrant was presented to Magistrate James Ferrier. Pet. App. 63a-71a. On the face sheet of the search warrant, in the box entitled "Specific Description of Premises and/or Persons to be Searched", the following text appears:

> "Michael A. McGinley ["John Doe"] W/M DOB-03/10/55 Brown hair, Brown eyes, SSN 176486694 618 Center St. Ashland Pa. Two story building w/an underground cellar, outside cement steps to cellar, 2nd flr. has 3 windows surrounded by light colored brick – other brick is dark lower flr. has a door on the east side and 2 store front windows, another door in center of both windows."

Pet. App. 63a.

In the box entitled "Probable Cause Belief is Based on the Following Facts and Circumstances" the words "See affidavit of probable cause attached" were inserted. *Id.* The only other mention of the affidavit on the face of the warrant appears in the box entitled "Date of Violation." There, the words "Numerous, see attached affidavits (sic)" appear. *Id.*

The names of Mary Doe and Jane Doe do not appear on either the search warrant or affidavit.

Paragraph 17 of the affidavit reads as follows:

> "This application seeks permission to search the premises of Michael McGinley 618 Center St. Ashland, Pa. and his red VW Rabbit bearing Pa. registration BNC-4044 as sales of methamphetamine have been made from the residence and the vehicle. The search should also include all occupants of the residence as the information developed shows that McGinley has *frequent visitors that purchase methamphetamine.* These persons may be on the premises at the time of the execution of the search warrant and may attempt to conceal controlled substances on their persons."

Pet. App. 70a (emphasis added).

Paragraph 20 of the affidavit reads as follows:

> "The application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually reside or own/rent the premises. This is done to prevent the discovery of said items in the hopes that said persons will not be subject to search when police arrive."

Pet. App. 70a-71a.

Armed with the warrant, Task Force police went to the John Doe house to carry out the search. As the officers

approached the house, they met John Doe and brought him into the house. Once inside, the officers found no visitors, but only John Doe's wife, Jane and their ten year old daughter, Mary. A female officer removed Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found.

John and Jane Doe filed a complaint under 42 U.S.C. §1983 on their own behalf, and on behalf of Mary Doe, against the searching officers and their superiors, and against various government entities, alleging that the officers illegally strip searched Jane and Mary Doe. The District Court denied qualified immunity to petitioners Joseph Groody, Adam Bermodin, and Robert Phillips and Agent Robert Bruce, the four Task Force officials who were directly involved in the search of Jane Doe and Mary Doe.

On appeal, the Court of Appeals for the Third Circuit affirmed, finding no grounds for the qualified immunity defense. Judge Alito dissented.

REASONS WHY THE PETITION SHOULD BE DENIED

The Decision Below Is Entirely Consistent with Both this Court's Recent Decision in *Groh v. Ramirez*, 124 S.Ct. 1284 (2004) and with Decisions in Other Courts of Appeals

Petitioners seek review of a decision by the Court of Appeals for the Third Circuit that breaks no new legal ground, faithfully applies the standards set forth by this

Court in *Groh v. Ramirez*, 124 S.Ct. 1284 (2004), and which is fully consistent with the approach taken by other Courts of Appeals on the issue of whether a facially deficient search warrant can be validated by incorporation of an affidavit submitted in support of the warrant. Petitioners make no claim of a conflict in the circuit courts on the governing legal standard and can point to no substantial constitutional issue presented by the lower court opinion. In sum, the Third Circuit Court of Appeals applied well settled standards under the Fourth Amendment of which a reasonable officer would know, and there is no justification for review of this largely fact-based decision.

Petitioners do not dispute the fact that the search warrant, on its face, did not authorize the strip search of respondents. The specification of the "persons to be searched" was limited to John Doe, and not his wife and ten year old daughter. Nor do petitioners dispute the long standing and well settled Fourth Amendment requirement that a search warrant particularly describe the persons or area to be searched. *Marron v. United States*, 275 U.S. 192, 196 (1927). This core protection of the Fourth Amendment serves the essential purposes of memorializing the magistrate's determination as to the scope of the search, limiting the discretion of the officers who execute the warrant, and informing the subjects of the search as to the legal limits. *Id. See also*, Pet. App. 10a-11a.

To attempt to validate the search, petitioners claim that the allegations in the affidavit of probable cause were somehow incorporated into the search warrant, but as the court below made clear, as to the persons to be searched there was **no** such incorporation. The court below ruled, consistent with this Court's decision in *Groh v. Ramirez* and with the rulings of other Courts of Appeals, that a

court may make reference to the affidavit where "the warrant uses appropriate words of incorporation . . . " 124 S.Ct. at 1290 (citing cases in the Courts of Appeals). Importantly, incorporation is not effectuated by simply attaching the affidavit; an affirmative link must be made in the warrant itself before a court is authorized to apply the "incorporation" standard. *Id.* In suggesting some difference in approach (without making any specific claim of a conflict in the circuits), petitioners claim that the incorporation standard "has caused confusion – at least in the Third Circuit" (Pet. at 8) and that other circuits apply somewhat different standards. Neither proposition is valid.

First, as we demonstrate below, there is no confusion in the Third Circuit. The court below applied the governing standard in a straightforward manner to determine there was no incorporation as to the persons to be searched. Second, other Courts of Appeals have similarly required "suitable words of reference." *United States v. Maxwell*, 920 F.2d 1028, 1031, 1032 (D.C. Cir. 1990); *United States v. Vesikuru*, 314 F.3d 1116, 1121 (9th Cir. 2002). The court below recognized two limited exceptions to this requirement: reference to the affidavit is permissible to either clear up an ambiguity or clerical error in the warrant itself or to modify a search warrant that on its face authorizes an overbroad search. Pet. App. 12a-13a. Of course, neither of these situations is presented by this case, as the search warrant unambiguously limits the search to John Doe.

The cases cited by petitioner do not in any way support the argument that the opinion below "is at odds with" other courts or that no other court has articulated a rule "as strict as the Third Circuit's." Pet. App. 9a-10a. Rather, these cases involve either exceptions to the incorporation

doctrine or appropriate references to the affidavit. *See, Commonwealth v. Carlisle*, 534 A.2d 469 (1987) (affidavit *limited* search by listing specific apartment number where warrant only gave address of apartment building); *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (where warrant specified person to be searched, and described that person along *with a detailed description of his residence*, search of the residence itself is permitted as a good faith execution of warrant for the premises); *United States v. Ortega-Jimenez*, 232 F.3d 1325 (10th Cir. 2000) (authorization in warrant to search persons "present and arriving" at designated place of search includes persons ordered by police to be at that location).[1] Notwithstanding inconsequential differences in the specific language used, as this Court has recognized, "most Courts of Appeals have [applied a standard of] appropriate words of incorporation." *Groh*, 124 S.Ct at 1290. The court below faithfully applied that standard in this case. There is no division in the lower courts.

On the merits, the court below was correct. First, the warrant specified a search of John Doe, and not his wife or child. Second, on this critical matter, there was *no* reference to the affidavit. Third, as noted by the court below, the fact that the affidavit was referenced with respect to the allegations of probable cause for the search "is actually unhelpful to the officers," Pet. App. 11a, since this reference was by its terms *limited* to the probable cause issue.

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[1] *State v. Carrillo*, 595 S.E.2d 219 (N.C. Ct. App. 2004), is consistent with this approach as there was a reference in the warrant authorizing a search of premises and persons "described in the application" for the warrant. Here, there was no such reference to an application of affidavit and only a single person was described as the person to be searched.

Fourth, even if the probable cause allegations could be referenced with respect to the quite distinct issue of who could be searched, there would be no justification for a strip search of the wife and ten year old daughter as the affidavit asserts only that visitors who are there to purchase drugs may be in possession.[2]

Groh v. Ramirez restated long-standing Fourth Amendment principles and denied a claim of qualified immunity for officers who executed a search warrant that did not particularly describe the persons or things to be seized. Here, as in *Groh,* the warrant did not authorize the search of the respondents, the warrant made no reference to the affidavit with respect to the persons to be searched, and the issuing magistrate did not alter the terms of the warrant before signing the document. Under these circumstances, there can be no claim to qualified immunity as the law has long been clearly established that a search of persons not particularly described in a warrant is unconstitutional. Given the state of the law, no reasonable officer could believe that a strip search of the wife and child of a person named in a warrant was permissible absent a specific reference to an affidavit that would supply this critical authorization which is specifically required by the Fourth Amendment. *Id.*

Indeed, this case presents even more compelling reasons to reject the qualified immunity defense than were

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[2] It should also be noted that this is not a case where officers had to act on the spur of the moment or to submit a warrant and warrant application under significant time pressure. This warrant was submitted after a several month investigation and there is no indication that the petitioners did not have ample time to draft and submit the warrant to the court.

present in *Groh* where the officers argued that the failure to list the property to be seized was a mere "clerical error." *Id.* at 1295 (Kennedy, J., dissenting). In *Groh*, the particularization of the property to be seized was made in both the affidavit and the application for search warrant and the entry on the warrant mistakenly listed the *place* to be searched instead of the items to be seized. Here, the warrant specifically named John Doe as the person to be searched and did not list Jane or Mary Doe. Thus, the warrant reflects a specific and limited authorization of who could be searched and that limitation was violated upon execution of the warrant. Moreover, the affidavit provides no grounds for a search of Jane and Mary Doe as the allegations that others might possess drugs is quite clearly limited to visiting drug buyers or dealers, and not family members. Pet. App. 70a-71a.

Petitioners' claim that the law with respect to incorporation is "far from settled," Pet. at 9, is fully rebutted both by this Court's discussion of that issue in *Groh,* 124 S.Ct. at 1290, and by a review of cases in the Courts of Appeals. The Third Circuit reviewed this warrant in the same fashion as this Court reviewed the warrant in *Groh* and reached the same conclusion as to the Fourth Amendment issues. Under settled principles, a reasonable officer would not believe that the search warrant provided authority for the strip searches of petitioners. *See Hope v. Pelzer,* 536 U.S. 730 (2002). There is no substantial constitutional issue presented for review.

CONCLUSION

Petitioners have provided no good reason for this Court to re-visit the issues recently addressed in *Groh v. Ramirez*. For the reasons stated in this Opposition, the Petition for Certiorari should be denied.

Respectfully submitted,

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